

No. 46966-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

2101 MILDRED, LLC and CONTAC 38, LLC,

Appellants,

v.

1921 MILDRED, LLC,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE JERRY COSTELLO

BRIEF OF RESPONDENT

DAVIES PEARSON, P.C.

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I. INTRODUCTION

Appellants argue that Appellant 2101 Mildred, LLC's construction of a 12 foot high 95 foot long concrete retaining wall 8 feet onto Respondent's easement and 1.5 feet onto Respondent's property along its length and 7.75 feet onto Respondent's property at the wing wall was not "intentional", "unreasonable", "unauthorized", or "injurious" to Respondent's property as required by RCW 4.24.630 to support an award of attorney fees. The sworn statement of Bruce Bodine, the owner and manager of 2101 Mildred, LLC, however, clearly shows that Mr. Bodine knew the surveyed and staked location of the boundary line and easement prior to constructing the retaining wall, and that he knowingly and intentionally constructed the retaining wall on the Respondent's property and easement because the retaining wall benefitted the use and value of his property. Mr. Bodine admits that he knew he was constructing the wall on the Respondent's property and easement. Mr. Bodine further admits that he did not seek or obtain authorization prior to constructing the retaining wall on Respondent's property and easement.

Appellants, 2101 Mildred, LLC and Contac 38, LLC, made a CR 68 Offer of Judgment to Respondent prior to trial offering the entry of a mandatory injunction requiring both Appellants to move the wall off of

the Respondent's property and easement and to restore Respondent's property and easement, and offering a judgment against both Appellants for taxable costs and reasonable attorney fees, if the trial court found RCW 4.24.630(1) to apply. Substantial evidence supports the trial courts' findings that 2101 Mildred, LLC intentionally, unreasonably, and without authorization constructed a concrete retaining wall on Respondent's property and easement, substantially injuring Respondent's property. The trial court properly entered a judgment against both Appellants pursuant to the Appellants' Offer of Judgment and RCW 4.24.630(1). This court should affirm the judgment of the trial court and award Respondent attorney fees on appeal.

II. STATEMENT OF FACTS

Respondent 1921 Mildred, LLC, and appellants 2101 Mildred, LLC and Contac 38, LLC, own adjoining parcels of commercial property on Mildred Street in Fircrest. CP 99. 1921 Mildred lies directly north of and contiguous to 2101 Mildred. The parcels share a 312 foot common boundary that runs east - west perpendicular to Mildred Street. CP 99-100. An easement for ingress and egress lies 8 feet on each side of the 312 foot common boundary creating a 16' wide mutual access easement

along the entire boundary that runs to the benefit and burden of both of the properties. CP 99-100.

The buildings on the adjoining properties lie just off of Mildred Street and adjacent to the easement. CP 18, 108, 136. The 16 foot wide easement runs between the buildings and provides the only access to the parking lot on the east end of the 1921 Mildred property. CP 108, 136. The easement slopes downhill from Mildred Street between the buildings to the parking lot that lies behind the buildings on the 1921 Mildred property. CP 110, 121. The parking lot at the bottom of the easement alley is flat and level, and sits substantially lower than the adjoining 2101 Mildred property to the south. CP 193.

In 2003, a rock retaining wall separated the adjoining properties in the area of the rear parking lot and provided lateral support for the higher 2101 Mildred property. CP 173, 178, 179, 193, 205. The rock wall was not “located within the easement on the north eight feet of the 2101 Mildred property” as stated in the Appellants’ Brief. *Appellants’ Brief at* 8; CP 173, 205. Instead, the rock wall was located on the 2101 Mildred property approximately 8 feet south of the boundary line and approximately on the southern line of the easement as shown on the site

development plans prepared for the 2101 Mildred property in 2003. CP 173, 205.

In 2003, the easement area north of the rock wall was flat and usable, but was not being used by the 1921 property at that time. CP 193, 121. Weeds and brush had taken root in that area. CP 193, 142. Nothing, however, prevented the owner of the 1921 Mildred property from removing the brush and using the easement north of the rock wall for the benefit of the 1921 Mildred property. In 2003 a utility pole and utility valve box were located just north of the rock wall as shown on the site development plans. CP 173, 205. The utility pole and valve box, however, did not interfere with the potential use of the easement in that area. In short, although the easement area just north of the rock wall was not being used by the 1921 Mildred property in 2003, that easement area was flat and could have been put to use by the 1921 Mildred property when need arose.

In 2003, 2101 Mildred, LLC, purchased the 2101 Mildred property for retail development. CP 53, 57, 109, 194. Prior to closing that purchase, Bruce Bodine, the owner and managing member of 2101 Mildred, LLC, obtained and read a title report regarding the 2101 Mildred property. CP 53. The title report disclosed the existence of the easement.

CP 53. Mr. Bodine read all of the title documents prior to closing his purchase of the 2101 Mildred property, including the Deed that created the easement. CP 53, 54. Mr. Bodine admits that he knew at the time he closed the purchase of the 2101 Mildred property that there was a 16 foot wide easement for ingress and egress lying 8 feet on either side of the entire boundary line between the 1921 and 2101 Mildred properties. CP 53, 54.

When Mr. Bodine purchased the 2101 Mildred property in 2003, the northern most portion of the 2101 Mildred property was not accessible by car from the rest of the 2101 property. CP 198-199. A building on the 2101 property was in the way. CP 198-199. In order to maximize the development potential of the 2101 property, Mr. Bodine felt he needed to create vehicular access between the isolated north lot and the rest of the 2101 Mildred property. CP 199-201. To create that access, Mr. Bodine decided to construct a 10-12 foot high steel reinforced concrete retaining wall on the east 95 feet of the boundary line between the 1921 and 2101 Mildred properties and within the 16 foot access easement. CP 57-59, 100, 201. With the retaining wall in place, the area behind the wall could be filled to support a roadway around the building to the north parking lot of the 2101 Mildred property. CP 198-199.

Mr. Bodine admits that he knew the location of the boundary line and easement prior to constructing the retaining wall. CP 53, 54. The location of the boundary line and easement were surveyed and mapped prior to the start of construction. CP 56. Site Plans prepared by Mr. Bodine and submitted to Fircrest prior to the construction showed the location of the boundary and easement. CP 56. The boundary line was staked and apparent on the ground prior to the construction of the wall. CP 123. It is undisputed that Mr. Bodine knew the location of the boundary line and easement prior to starting construction of the wall. CP 53, 54, 56, 123.

With actual knowledge of the surveyed location of the boundary line and easement, Mr. Bodine chose to construct a 10 to 12 foot high, 95 foot long steel reinforced concrete retaining wall on the boundary line between the 1921 and 2101 Mildred properties and within the easement. CP 58, 110, 122. The new retaining wall was constructed substantially north of where the old rock wall, utility pole and utility vault had been located. CP 145, Appendix A. Mr. Bodine personally directed where the retaining wall was to be constructed. CP 58. Mr. Bodine admits that he intended to build the retaining wall directly on the boundary line between the two properties. CP 58. Mr. Bodine admits that he knew he was

building the retaining wall within the easement. CP 57. Mr. Bodine admits that he knew that placing the wall on the boundary line would eliminate the ability of the 1921 Mildred property to use any portion of the east 95 feet of the easement covered by the wall. CP 57, 58. Mr. Bodine admits that despite knowing he was obstructing the easement, he chose to construct the wall on the 1921 Mildred property and easement because it benefitted his property to do so. CP 200-201.

The concrete foundation for the retaining wall extends 1.5 feet across the boundary line onto the 1921 Mildred property over its entire 95 foot length. CP 59, 100. Additionally, a wing wall that supports the east end of the retaining wall extends 7.75 feet over the boundary onto the 1921 property. CP 59, 100. Mr. Bodine admits that he knew when he built the wall that the concrete foundation below the wall extended 1.5 feet onto the 1921 Mildred property and that the wing wall extended 7.75 feet across that boundary line onto 1921 Mildred property. CP 59.

Mr. Bodine admits that prior to constructing the wall he never sought and never obtained permission from the owner of the 1921 property, Jung Lee, to construct the wall on the 1921 Mildred property or easement. CP 59, 202-203. Mr. Bodine never spoke to Mr. Lee before submitting an application to the City of Fircrest for a permit to build the

wall. CP 203. After obtaining a permit, Mr. Bodine spoke to Mr. Lee only to “let him know what he was doing” (CP 203), not to obtain Mr. Lee’s permission to build the wall on the 1921 property and easement. CP 202-203. Mr. Bodine is very clear that he “did not go to [Mr. Lee] to get permission to build the wall”. CP 202-203. Mr. Bodine only obtained Mr. Lee’s permission to stage equipment on the 1921 property during the construction of the wall. CP 203, 129. Mr. Bodine never sought and never obtained permission from Mr. Lee to construct the wall on the 1921 Mildred property and easement. CP 59, 129, 202-203.

The wall constructed by Mr. Bodine begins at the bottom of the alley easement access to the rear parking lot on the southern boundary of the easement, eight feet south of the boundary line near the corner of the building on the 2101 Mildred property. CP 58, 122, 145, 146, 147, 149, 152. From that point the wall angles to the northeast until it reaches the boundary line eight feet north of the southern boundary of the easement. *Id.* The wall then continues east along the boundary line to the wing wall, then extends north 7.75 feet onto the 1921 Mildred property at a point 5 feet west of the southeast corner of the 1921 Mildred property. CP 58, 59, 100, 122.

1921 Mildred, LLC purchased the 1921 Mildred property in 2011 and is in the process of improving the property to a fresh “vanilla shell”. CP 206-207. Once the shell is completed the company will seek a long term tenant for the 1921 Mildred property. CP 207. Final renovation of the property will be completed when a tenant is identified. CP 207.

The retaining wall severely encroaches into the driving lane at the bottom of the easement alley that is used by trucks to access the loading dock at the rear of the 1921 Mildred property. CP 207, 145, 146, 147, 149, 152; *see Appendix A, B, C, D, and E*. The intrusion of the wall into the easement driving lane limits the size of truck that can safely access the rear of the property and loading dock. CP 207. Prospective tenants have expressed disinterest in the 1921 Mildred property due to the encroaching retaining wall. CP 207.

The retaining wall eliminates all use of the south 8 feet of the east 95 feet of the 1921 Mildred easement for ingress, egress and traffic circulation. CP 207. With the retaining wall in place, the driving lanes in the 1921 Mildred parking lot must be moved 8 feet to the north, eliminating space that could otherwise be used for parking. CP 207. Under applicable Code, 36 parking spaces will be required on site for the anticipated use of the property. CP 207. With the retaining wall in place,

a maximum of 32 parking spaces can be located on the property. CP 207. When the retaining wall is removed and use of the easement for ingress, egress and traffic circulation is restored, 36 parking spaces can be located on the property. CP 207.

The easement provides a substantial benefit to the 1921 Mildred property. CP 207. The construction of the retaining wall on the 1921 Mildred property and easement substantially reduces the development potential and value of the 1921 Mildred property. CP 207.

1921 Mildred, LLC brought this action for trespass, intentional trespass, and ejectment seeking a mandatory injunction requiring the defendants to move the wall off of the 1921 Mildred property and easement, and a judgment for its costs and reasonable attorney fees pursuant to the intentional trespass statute, RCW 4.24.630(1). CP 1-9.

On August 29, 2014, the Appellants delivered to 1921 Mildred, LLC a CR 68 Offer of Judgment which provides, in relevant part, that:

Defendants 2101 Mildred, LLC and Contac 38, LLC, by and through undersigned counsel, make the following offer, pursuant to CR 68.

Defendants offer to allow judgment to be taken against Defendants and in favor of Plaintiff 1921 Mildred, LLC on the claims made in this action for:

- (1) [A declaratory judgment with agreed findings as set forth in the Offer of Judgment]

- (2) A mandatory injunction requiring Defendants to:
 - a. remove all improvements placed by the defendants on the 1921 Mildred Property and the 1921 Mildred Easement that interfere with the use by Plaintiff of the 1921 Mildred Property or 1921 Mildred Easement for ingress and egress over and across said areas;
 - b. restore the 1921 Mildred Property and the 1921 Mildred Easement to their prior condition;
- (3) Taxable costs incurred to the date of this offer; and
- (4) A judgment dismissing Defendant's counterclaims, with prejudice.

CP 30, 36-38.

Prior to accepting the Offer of Judgment, counsel for the Respondent called Appellants' counsel to confirm that the offer to pay "taxable costs" included the payment of reasonable attorney fees, investigative costs, and litigation related expenses as provided in the intentional trespass statute RCW 4.24.630, if the trial court found that statute to apply. CP 19, 31, 49. Counsel for the Appellants confirmed this understanding to be correct. CP 49, 51. Appellants admit that RCW 4.24.630(1) defines "costs" as including reasonable attorney fees, and admit the offer to pay "taxable costs" included reasonable attorney fees if the trial court found RCW 4.24.630(1) to apply. CP 51, *Appellants Brief* at 5, 27.

1921 Mildred, LLC accepted Appellants' Offer of Judgment and moved the trial court for the entry of a Judgment and Decree in accord with the Offer and for a money judgment against the Appellants for costs, investigative costs, reasonable attorney fees and other litigation related expenses as provided for in the Offer of Judgment and RCW 4.24.630(1). CP 17- 29, 31, 40-41.

Following a hearing based on affidavits, the trial court entered Findings of Fact and Conclusions of Law that provide in relevant part as follows:

...

6. Under RCW 4.24.630(1) a party "wrongfully causes waste or injury" to the land of another if that party enters onto the land of another and (1) intentionally commits the acts of waste or injury; (2) the acts of waste or injury are unreasonable; and (3) the offending party knows or has reason to know he or she lacks authority to commit the acts.

7. Defendant 2101 Mildred, LLC, entered onto plaintiff's property and intentionally, unreasonably, and without authority, constructed a concrete retaining wall on the plaintiff's property and easement in violation of RCW 4.24.630(1).

8. The retaining wall obstructs the East 95 feet of the plaintiff's easement over the defendant's property. The foundation of the wall extends 1.5 feet onto the plaintiff's property. The wing wall extends 7.75 feet into the plaintiff's property

9. The defendants' trespass onto the plaintiff's property was intentional.

8. Bruce Bodine of 2101 Mildred knew the location of the plaintiff's boundary line and easement at the time he purchased his property, and he chose to construct the concrete retaining wall on the plaintiff's property and easement in order to gain better access to parking at the rear of his property and to facilitate obtaining a building permit.

9. The construction of the concrete retaining wall on the plaintiff's property and easement caused an unreasonable waste of plaintiff's property.

10. Mr. Bodine knew he did not have authority to enter the plaintiff's property or to construct a retaining wall thereon.

11. Plaintiff is entitled to a judgment under RCW 4.24.630(1) for its costs, investigative costs, reasonable attorney fees and litigation expenses incurred in bringing this action.

CP 210-214.

Based on the Defendants' CR 68 Offer of Judgment and the Findings of Fact and Conclusions of Law made by the court, the trial court entered a Judgment and Decree issuing a mandatory injunction requiring the Appellants to remove all improvements placed on the 1921 Mildred property and easement and to restore the 1921 Mildred property and easement to its prior condition. CP 215-219. The court further entered a money judgment against both Appellants, 2101 Mildred, LLC and Contac

38, LLC, for the Respondent's attorney fees, costs, and litigation related expenses pursuant to RCW 4.24.630(1) in the total amount of \$53,999.98. CP 215-219. Appellants appeal only the trial court's entry of the money judgment for costs and attorney fees under RCW 4.24.630(1). *Appellants' Brief* at 1-2. Appellants do not dispute the reasonableness of the fee award and do not dispute the issuance of the mandatory injunction requiring Appellants to move the wall. *Appellants' Brief* at 1-2.

III. ARGUMENT

1. *Substantial evidence supports the trial court's findings and conclusions that the Appellants entered onto the land of another and (1) intentionally committed the acts of waste or injury; (2) the acts of waste or injury were unreasonable; and (3) Appellants knew that they lacked authority to commit the acts as required to establish a violation of the waste statute, RCW 4.24.630(1).*

Unchallenged findings of fact are verities on appeal. *Hegwine v. Longview Fibre Co.*, 132 Wash.App. 546, 556, 132 P.3d 789 (2006). Challenged findings of fact are reviewed as to whether they are supported by substantial evidence, and, if so, whether the findings of fact support the trial court's conclusions of law. *Hegwine*, 132 Wash.App. at 555-56. Where, however, as here the record consists only of affidavits, memoranda of law and other documentary evidence, without live witnesses, the appellate court is in substantially the same position as the trial court and is

not bound by the trial court's factual findings. *Bainbridge Island Police Guild v. Puyallup*, 172 Wash.2d 398, 407, 295 P.3d 190 (2011).

Substantial evidence supports a trial court's finding of fact when there is sufficient evidence contained in the record to persuade a fair-minded person that the finding is true. *Hegwine*, 132 Wash.App. at 555-56. In conducting this analysis, appellate courts should view the evidence and all reasonable inferences therefrom in the light most favorable to the prevailing party. *Hegwine*, 132 Wash.App. at 556; *Korst v. McMahon*, 136 Wash.App. 202, 206, 148 P.3d 1081 (2006). If substantial evidence is found in the record to support the trial court's findings, an appellate court should not substitute its judgment for that of the trial court. *Proctor v. Huntington*, 146 Wash.App. 836, 845, 192 P.3d 958 (2008).

A trial court's conclusions of law are reviewed de novo. *Proctor*, 146 Wash.App. at 845. The interpretation of a statute or court rule is a question of law that is reviewed de novo. *Medcalf v. Dep't of Licensing*, 133 Wash.2d 290, 297, 944 P.2d 1014 (1997). Issues involving the construction of a CR 68 offer of judgment are reviewed de novo; however, disputed factual findings concerning the circumstances under which the CR 68 offer was made are usually reviewed for clear error. *Seaborn Pile Driving Co., Inc. v. Glew*, 132 Wash.App. 261, 266, 131 P.3d 910 (2006);

Lietz v. Hansen Law Offices, P.S.C., 166 Wash.App. 571, 580, 271 P.3d 271 (2012).

Accordingly, this court should review whether substantial evidence in the record supports the trial court's findings that (1) Bruce Bodine of 2101 Mildred, LLC, knew the location of the boundary line and easement before he constructed the wall; (2) with that knowledge, Bruce Bodine intentionally constructed a concrete retaining wall on the 1921 Mildred property and easement in order to improve the access to his north parking lot and to facilitate obtaining a building permit; (3) the retaining wall encroaches 1.5 feet onto the 1921 Mildred property at the base of the wall and 7.75 feet onto the 1921 Mildred property at the wing wall; (4) Mr. Bodine knew he did not have authority to enter the plaintiff's property or to construct a retaining wall thereon; and (5) the wall unreasonably obstructs 1921 Mildred, LLC's use of east 95 feet of its easement over the 2101 Mildred property. *See Bryant v. Palmer Coking Coal Co.*, 86 Wash.App. 204, 210, 936 P.2d 1163 (1997). As shown below, substantial evidence in the record supports each of those findings of fact. Because substantial evidence supports the trial court's findings, this court should not disturb the trial court's findings of fact and the judgment of the trial court should be affirmed. *Proctor*, 146 Wash.App. at 845.

2. *The trial court properly entered judgment against Appellant Contac 38, LLC according to the terms of Contac 38, LLC's CR 68 Offer of Judgment.*

Respondent admits that 2101 Mildred, LLC constructed the concrete retaining wall in 2004 or 2005, prior to its sale of a portion of the 2101 Mildred property to Contac 38, LLC in 2006. Respondent further admits that Contac 38 did not participate in the construction of the wall. Nonetheless, Contac 38 now owns a portion of 2101 Mildred property that includes the wall in question, and Contac 38 was properly made a defendant in this action which sought to have the wall removed.

For their own purposes, both defendants, 2101 Mildred, LLC and Contac 38, LLC, made an Offer of Judgment pursuant to CR 68 to 1921 Mildred, LLC offering the entry of a judgment against both of the defendants, jointly and severally, as follows:

Defendants 2101 Mildred, LLC ***and*** Contac 38, LLC, by and through undersigned counsel, make the following offer, pursuant to CR 68.

Defendants offer to allow judgment to be taken against ***Defendants*** and in favor of Plaintiff 1921 Mildred, LLC ***on the claims made in this action*** for:

...

(2) A mandatory injunction requiring Defendants to [remove the wall and restore the 1921 Mildred property, and];

(3) ***Taxable costs*** incurred to the date of this offer. ...

CP 30, 36-38.

Contac 38 admits that the term “taxable costs” as defined by RCW 4.24.630 includes reasonable attorney fees, investigative costs, and litigation related expenses. CP 51, *Appellant’s Brief at 5, 27*. Contac 38’s Offer of Judgment, therefore, included a judgment against Contac 38 for reasonable attorney fees if the trial court found that all of the required elements of RCW 4.24.630 had been shown, which it did. The trial court properly entered judgment against Contac 38 pursuant to the terms of Contac 38’s Offer of Judgment.

CR 68 provides a procedure for defendants to offer to settle cases before trial. The purpose of the rule is to encourage parties to settle their disputes and to avoid lengthy litigation. *Dussault v. Seattle Pub. Schs.*, 69 Wash.App. 728, 732, 850 P.2d 581 (1993), *review denied*, 123 Wash.2d 1004, 868 P.2d 872 (1994). The rule achieves that objective by shifting any post-offer of judgment costs of litigation to a plaintiff who rejects a defendant’s CR 68 offer and does not achieve a more favorable result at trial. This cost-shifting provision is called the “CR 68 default rule”. *Seaborn*, 132 Wash.App. at 272. Because of the potential significant adverse consequences to a plaintiff who rejects an offer of judgment,

courts must construe any ambiguities in a CR 68 offer of judgment against the defendant/offeree and in favor of the plaintiff/offeree. *Seaborn*, 132 Wash.App. at 272; *Lietz*, 166 Wash.App. at 582.

Here, both 2101 Mildred, LLC and Contac 38, LLC offered 1921 Mildred, LLC, a joint and several judgment against the “Defendants” if the court found that the elements of RCW 4.24.630(1) had been satisfied. The trial court found RCW 4.24.630(1) to apply. Contac 38 is bound by its offer of judgment. Any ambiguities in the offer of judgment must be construed against Contac 38. *Seaborn*, 132 Wash.App. at 272.

The trial court properly entered judgment against Contac 38 pursuant to its offer of judgment. Contac 38 never objected to the trial court’s judgment on the basis that Contac 38 had not participated in the construction of the wall. This argument is made for the first time on appeal. This court should affirm the judgment against Contac 38.

3. *The trial court properly entered judgment against Appellants for fees and costs under RCW 4.24.630(1) when substantial evidence supports the trial court’s finding that the concrete retaining wall caused unreasonable waste or injury to Respondent’s land and the court ordered injunctive relief requiring the wall to be removed, even though the dollar value of the damage was not shown.*

Bruce Bodine admits and the trial court found that 2101 Mildred, LLC, with actual knowledge of the surveyed location of boundary line and

easement, chose to construct a 10 to 12 foot high, 95 foot long reinforced concrete retaining wall on the 1921 Mildred property and easement. CP 53, 54, 56, 58, 110, 122-123. Plaintiff sued seeking injunctive relief requiring the wall to be removed and for attorney fees pursuant to RCW 4.24.630(1). CP 1-9. In settlement of the claim Appellants agreed to move the concrete retaining wall eight feet to the south at the Appellants' sole and substantial expense, and to restore the 1921 Mildred property and easement to its prior condition. CP 30, 36-38.

The trial court found that the "concrete retaining wall on the plaintiff's property and easement caused an unreasonable waste of plaintiff's property". CP 212. That finding is support by substantial evidence as further discussed below. Nonetheless, despite the admissions of Bruce Bodine, the substantiated findings of the court, and the fact that the court awarded injunctive relief, not damages, appellants argue that 1921 Mildred, LLC should not be entitled to attorney fees under RCW 4.24.630 because it did not establish "any dollar amount of damages" that it had sustained. *Appellant's Brief* at 16. Appellants' argument has no basis in fact or law.

RCW 4.24.630(1) provides in relevant part:

Every person who goes onto the land of another and who ... wrongfully *causes waste or injury to the land* ... is liable to the injured party for treble the amount of the damages caused by the removal, waste or injury. For purposes of this section, a person acts “wrongfully” if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. ... ***In addition***, the person is liable for reimbursing the injured party for the party’s reasonable costs, including but not limited to investigative costs and reasonable attorneys’ fees and other litigation-related costs. [*Emphasis supplied*]

Nothing in RCW 4.24.630(1) requires a claimant to show that it has sustained damages that are specifically quantified into “some dollar amount” as asserted by the Appellant. *Appellant’s brief at 16*. The element that must be proven under RCW 4.24.630(1) is that a person wrongfully caused “waste or injury to the land” of another, not “some dollar amount of the damages”. *RCW 4.24.630(1)*. An award of money damages is one potential consequence of the wrongful injury to land of another; however, “waste or injury to the land”, not the dollar value of the damage inflicted, is the element that must be shown to establish a claim under *RCW 4.24.630(1)*. Attorney fees are to be awarded under the statute “in addition” to any monetary damages or other relief awarded for the wrongful damage done. *RCW 4.24.630(1)*.

“Injury” is distinct and different from a dollar amount of damages. *Panag v. Farmers Insurance Company of Washington*, 166 Wash.2d 27, 58, 204 P.3d 885 (2009); *Nordstrom, Inc. v. Tampourlos*, 107 Wash.2d 735, 740, 733 P.2d 208 (1987). When a statute uses the phrase “injury to the land” it makes it clear that injuries that are not monetarily quantified will satisfy the requirement. *Nordstrom*, 107 Wash.2d at 74. The “injury to land” requirement is satisfied by proof showing the plaintiff’s property interest is diminished, regardless of whether the specific dollar value of the loss is quantified. *Panag*, 166 Wash.2d at 57. It is not necessary to show the dollar value of the injury sustained when injunctive relief is the remedy sought. *Panag*, 166 Wash.2d at 57.

A party who has committed a tortious act is not permitted to escape liability for his wrongful act due to difficulty in ascertaining the amount of damages the plaintiff has sustained. *Wenzler & Ward Plumbing and Heating Company v. Sellen*, 53 Wash.2d 96, 100-101, 330 P.2d 1068 (1958). *Colwell v. Etzell*, relied on by Appellants, stands for the principle that in order to establish a right to recover attorney fees under RCW 4.24.630(1) a wrongful waste or injury to the claimant’s land must be shown, not that the specific dollar value of the loss sustained must be

established. *Colwell v. Etzell*, 119 Wash.App. 432, 442, 81 P.3d 895 (2003).

Here, substantial evidence in the record supports the trial court's finding that the "concrete retaining wall on the plaintiff's property and easement caused an unreasonable waste of plaintiff's property". The retaining wall severely encroaches into the driving lane at the bottom of the easement alley. CP 207. That easement alley is used by trucks to access the loading dock at the rear of the 1921 Mildred property. CP 207. The wall's intrusion into the easement limits the size of truck that can safely access the rear of the property and loading dock. CP 207. Prospective tenants have expressed disinterest in the 1921 Mildred property due to the encroaching retaining wall. CP 207, See also *Appendix A, B, C, D and E* (CP 145, 146, 147, 149, 152).

The retaining wall eliminates all use of the south 8 feet of the east 95 feet of the 1921 Mildred easement for ingress, egress and traffic circulation. CP 207. With the wall in place, the driving lanes in the 1921 Mildred parking lot must be moved 8 feet to the north, eliminating space that could otherwise be used for parking. CP 207. Applicable building codes will require 36 parking spaces on site for the intended use of the property. CP 207. With the retaining wall in place, a maximum of 32

parking spaces can be located on the property. CP 207. When the retaining wall is removed and use of the easement is restored, 36 parking spaces can be located on the property. CP 207.

The construction of the retaining wall on the 1921 Mildred property and easement substantially reduces the development potential and value of the 1921 Mildred property. CP 207. As such, the retaining wall causes substantial “waste or injury” to the land and easement of 1921 Mildred, LLC. 1921 Mildred, LLC has established the “waste or injury” element of its claim as required by RCW 4.24.630(1). Proof of the specific dollar value of the damage sustained is not required. The court properly awarded attorney fees under RCW 4.24.630(1).

4. *It is undisputed that the concrete wall constructed by the Appellant encroaches onto the land of the Respondent, not just its easement, causing waste or injury to the Respondent's land in violation of RCW 4.24.630(1) by unreasonably interfering with Respondents' use of its property and easement.*

RCW 4.24.630(1) provides that “Every person who goes *onto the land of another* and who ... wrongfully causes waste or injury to the land ... is liable to the injured party” for treble damages, litigation costs and attorney fees. *RCW 4.24.630(1)*. Appellants argue that RCW 4.24.630 should not apply here because *much* of the property wasted by the construction of the retaining wall was *only* the plaintiff's non-exclusive

easement area. *Appellants' Brief at 19*. Appellants' ignore, however, the undisputed fact that in addition to consuming the entire south 95 feet of the plaintiff's easement, the wall was also constructed 1.5 feet onto the plaintiff's property along its length and 7.75 feet onto plaintiff's property at the wing wall. CP 59, 100. It is undisputed that Mr. Bodine constructed the retaining wall on the 1921 Mildred property, in addition to on the 1921 Mildred easement. CP 59, 100. Mr. Bodine admits that the wall was constructed on the 1921 Mildred property and easement. CP 59, 100, *Appellants' Brief at 19*.

Colwell v. Etzell, relied on by the Appellants, is clearly distinguishable from the case at hand and does not support the Appellants' position. In *Colwell*, Colwell owned a permanent non-exclusive easement across the land of Etzell. *Colwell*, 119 Wash.App. at 435. Fearing damage to his land from heavy water runoff, Etzell went onto the easement over his own property and ditched and positioned culverts in five different places along the roadway. *Id.*, 119 Wash.App. at 436. Colwell sued Etzell for intentional interference with his easement in violation of RCW 4.24.630. The court held, however, that RCW 4.24.630 did not apply because Etzell had not gone onto the "land of another" as required by RCW 4.24.630 when he installed ditches along the non-

exclusive easement road over his own property. *Id.*, 119 Wash.App. at 439. Additionally, the court held that Etzell had not “wrongfully cause[d] waste or injury” as required by RCW 4.24.630 because the ditches installed by Etzell were not inconsistent with Colwell’s use of the easement for its intended purpose. *Id.*, 119 Wash.App. at 439-340.

Here, contrary to *Colwell*, the concrete retaining wall constructed by 2101 Mildred, LLC encroaches not only onto 1921 Mildred’s easement, but also onto the 1921 Mildred property. Here, 2101 Mildred, LLC “entered onto the land” of 1921 Mildred, LLC. Additionally, contrary to *Colwell*, here the concrete retaining wall prevents 1921 Mildred, LLC from using the property and easement on which the wall stands, including the entire south 8 feet of the east 95 feet of the easement. CP 207.

It is true that a servient estate owner may use its property in any *reasonable* way that *does not* interfere with the dominate estate holder’s easement. *Littlefair v. Schulze* 169 Wash.App. 659, 665, 278 P.3d 318 (2012). Where, as here, however, the servient estate owner so obstructs an easement that the dominant easement owner is denied all use of the easement and loss of the easement is threatened by adverse possession, the servient estate owner’s use is wrongful and unreasonable, and the

dominate estate holder has the right to protect its easement, remove the interfering structure, and restore its full use of its easement rights. *Id.*, 169 Wash.App. at 666.

Here, 2101 Mildred, LLC constructed a 10' high concrete retaining wall on both the 1921 Mildred property and on the 1921 Mildred easement. The retaining wall prohibits 1921 Mildred, LLC from using any portion of its property and easement that is covered by the wall. If 1921 Mildred, LLC did not act to protect its property and easement rights, the property and easement consumed by the wall would be at risk of loss through adverse possession. The wall prevents 1921 Mildred, LLC from using its easement for its purpose intended. Appellants' use of the Respondent's property and easement in a manner that prohibits the Respondent's use of the same is wrongful and unreasonable. The trial court properly found Appellants' encroachment into Respondent's land and easement was a violation of RCW 4.24.630. The judgment of the trial court should be affirmed.

5. Substantial evidence supports the trial courts findings that Appellants' entry onto Respondent's property and easement was intentional and unreasonable, and in violation of RCW 4.24.630.

RCW 4.24.630(1) provides that "Every person who goes onto the land of another and who ... *wrongfully* causes waste or injury to the land

... is liable to the injured party”. RCW 4.24.630(1) further provides that “For purposes of this section a person acts ‘wrongfully’ if the person *intentionally and unreasonably* commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act”.

Substantial evidence supports the trial courts finding that Bruce Bodine intentionally and unreasonably constructed the wall on 1921 Mildred, LLC’s property and easement. Mr. Bodine admits that he knew the location of the Respondent’s boundary line and easement at the time he purchased his property and at the time he constructed the wall. CP 53, 54. Mr. Bodine knew the easement was 16’ wide and he knew the easement was created for the benefit of the Respondent’s property. CP 53, 54. Mr. Bodine admits that he prepared and filed development plans with the City of Fircrest showing the surveyed location of the boundary line and easement before he constructed the wall. CP 56. Mr. Bodine admits that the location of the boundary line was staked and apparent on the ground at the time he constructed the wall. CP 123.

With actual knowledge of the surveyed location of the Respondent’s boundary line and easement, Mr. Bodine admits that he intentionally constructed a 12 foot high concrete retaining wall on the plaintiff’s 8 foot access easement and 1.5 feet onto the plaintiff’s property

along its 95 foot length and 7.75 feet onto the plaintiff's property at the wing wall. CP 58, 59, 100, 110. Mr. Bodine personally participated in locating where the wall would be constructed. CP 58. Mr. Bodine admits that he intended the wall be placed on the boundary line on top of the Respondent's easement, and that he knew that placing the wall on the boundary line would eliminate the Respondent's ability to use any portion of its property and easement that was covered by the wall. CP 57-58.

Mr. Bodine cannot argue that he did not intentionally construct the wall on Respondent's property and easement. He admits that he chose to construct the wall on the Respondent's property and easement because it benefitted his property. CP 199-201. He intentionally constructed the wall on the Respondent's property to improve his access to the rear of his property, without regard to the adverse consequences to the Respondent's property. CP 199-201. The location of the wall was not the result of any mistake, misunderstanding or excusable neglect. Instead, Mr. Bodine chose to place the wall on Respondent's property and easement, and chose to accept the consequences of that action believing the benefits of his decision outweighed the risk. Substantial evidence in the record support findings of (1) an invasion of the real property interests of Respondent; (2) the intentional act of the Appellant; (3) reasonable foreseeability that the

invasion would disturb the Respondent's property interests; and (4) actual and substantial injury to the Respondent, all as required to establish an intentional trespass. *Bradley v. Am. Smelting & Ref. Co.*, 104 Wash.2d 677, 692-693, 709 P.2d 782 (1985). Substantial evidence supports the trial courts finding of an intentional entry onto Respondent's property and easement.

Appellant further asserts that Appellant's construction of the wall on Respondent's property and easement was not unreasonable because the owner of the 1921 property at the time of construction was not then using that portion of the easement. *Appellants' Brief* at 23-24. The prior owner's lack of use of the easement area north of the old rock wall before the construction of the concrete retaining wall in 2003, however, is neither relevant to nor dispositive of the question of whether the Appellants' trespass onto the Respondent's property and easement was wrongful or unreasonable. Even if the owner of the 1921 Mildred property had not yet used or developed that portion of the deeded easement area, Mr. Bodine did not have the right to take the Respondent's property and easement rights. The 1921 Mildred easement rights were not lessened or abandoned by the prior owner's lack of use of a deeded easement. *Heg v. Alldredge*,

157 Wash.2d 153, 158, 137 P.3d 9 (2006); *Thompson v. Smith*, 59 Wash.2d 397, 407, 367 P.2d 798 (1962).

The lapse of time without using an easement cannot, by itself, constitute an abandonment of an easement. *Id.* 157 Wash.2d at 157; *Neitzel v. Spokane Int'l Ry. Co.*, 80 Wash. 30, 41 (1914). You cannot lose a deeded property right by simply not using the property. *Heg.*, 157 Wash.2d at 158; *Thompson*, 59 Wash.2d at 407. To prove the abandonment of an easement, intent to abandon the easement must be unequivocally shown. *Winsten v. Prichard*, 23 Wash.App. 428, 431 (1979). Acts evidencing abandonment of an easement must be unequivocal, decisive and inconsistent with the continued existence of the easement. *Heg.*, 157 Wash.2d at 158.

Here, although the easement area north of the old rock wall was not being used by the 1921 property owner prior to the construction of the retaining wall, the easement in that area was flat and could have been put to use when need arose. CP 121, 142. 173, 193. Nothing in the record indicates that the owner of the 1921 property intended to abandon its easement prior to the construction of the wall. The weeds, brush, utility pole and valve box in that area did not interfere with the future use of the easement. CP 121, 142. 173, 193. Use of the easement area is extremely

beneficial to the development of the Respondent's property. CP 207.

Substantial evidence supports the trial court's finding, or conclusion, that "the construction of the retaining wall on the Respondent's property and easement caused an unreasonable waste of the plaintiff's property".

6. *Substantial evidence supports the trial court's finding that Mr. Bodine knew he did not have authority to take the 1921 Mildred property and easement when he constructed the wall on the 1921 Mildred property and easement.*

RCW 4.24.630(1) provides that for purposes of the statute "a person acts 'wrongfully' if the person intentional and unreasonably commits the act or acts while *knowing, or having reason to know*, that he or she *lacks authorization* to so act". *RCW 4.24.630(1)*. The trial court found that "Mr. Bodine knew he did not have authority to enter the plaintiff's property or to construct a retaining wall thereon". CP 212. That finding is supported by substantial evidence.

Mr. Bodine admits that prior to constructing the wall he never sought and never obtained permission from the owner of the 1921 property, Jung Lee, to construct the wall on the 1921 Mildred property or easement. CP 59, 202-203. Mr. Bodine never spoke to Mr. Lee before submitting an application to the City of Fircrest for a permit to build the wall. CP 203. Mr. Bodine is very clear that he did not, at any time "go to

[Mr. Lee] to get permission to build the wall”. CP 202-203. After obtaining a permit, Mr. Bodine spoke to Mr. Lee only to “let him know what [he] was doing” (CP 203), not to get Mr. Lee’s permission to build the wall on the 1921 property and easement. CP 59, 202- 203. Mr. Bodine is very clear that the only permission he got from Mr. Lee was to temporarily stage equipment on Mr. Lee’s 1921 property during the construction of the wall. CP 129, 203. Mr. Bodine never sought and never received authorization from Mr. Lee to construct the wall on the 1921 Mildred property and easement. CP 59, 129, 202-203.

Mr. Bodine knew that he was not “authorized” to construct the wall on Mr. Lee’s property and easement because Mr. Bodine admits he had neither sought nor obtained Mr. Lee’s authority to do so. CP 59, 129, 202-203. Nonetheless, without any citation to authority, Appellants ask this court to hold that Mr. Lee’s limited grant of permission to temporarily park machinery on his property during the construction of the retaining wall is equivalent to Mr. Lee authorizing the taking of his property and easement. *Appellants’ Brief at 26*. Nothing in the record or the law supports such a conclusion.

The term “authorization” as used in RCW 4.24.630(1) implies some form of informed permission or consent that is volitionally given.

“Authorization” is something more than the failure to resist Mr. Bodine’s wrongful trespass, particularly when there is no evidence that Mr. Lee even knew that a wrongful trespass was occurring. There is no evidence that Mr. Lee knew that he had an easement or that he knew the location of his property boundary or easement. There is no evidence that Mr. Lee knew that the wall was being constructed on his property or his easement, or that he knew the construction of the wall would adversely impact any right that he had. Mr. Lee only authorized the temporary parking of construction equipment on his property. There is no evidence that Mr. Lee knowingly authorized Mr. Bodine to construct the retaining wall on his property and easement. The trial court’s finding that “Mr. Bodine knew he did not have authority to enter the plaintiff’s property or to construct a retaining wall thereon” is supported by substantial evidence and the judgment of the trial court should be affirmed.

7. *Respondent should be awarded costs and reasonable attorney fees on appeal pursuant to RCW 4.24.630(1).*

Prior to trial Appellants made a CR 68 Offer of Judgment to Respondent that included “Taxable costs incurred to the date of this offer”. CP 44. Appellants admit that “taxable costs” as used in the offer included reasonable attorney fees because RCW 4.24.630(1) on which the fee claim

is based defines “costs” as including reasonable attorney fees. *Appellant’s Brief* at 27; *Lietz v. Hansen Law Offices, P.S.C.*, 166 Wash.App. 571, 581-582, P.3d 899,905 (2012). Respondent accepted Appellants’ Offer of Judgment, and the trial court awarded Respondent its attorney fees incurred through the date of the offer. CP 31, 47, 227, 231. Appellants then appealed the trial court’s award of attorney fees.

For all of the reasons set forth above, 1921 Mildred, LLC was entitled to an award of attorney fees in the trial court pursuant to RCW 4.24.630(1). Where a statute or contract provides for an award of attorney fees in the trial court, an appellate court has authority to award fees pursuant to the same statute on appeal. *Bloor v. Fritz*, 143 Wash.App. 718, 753, 180 P.3d 805 (2008); *Standing Rock Homeowners Ass’n v. Misich*, 106 Wash.App. 231, 247, 23 P.3d 520 (2001). Because 1921 Mildred, LLC was entitled to an award of attorney fees in the trial court under RCW 4.24.630(1), 1921 Mildred, LLC is entitled to an award of attorney fees on appeal. *Bloor*, 143 Wash.App. at 753; *Standing Rock*, 106 Wash.App. at 247.

Without any citation to authority, Appellants assert that Respondent should not receive attorney fees on appeal because “CR 68 only allows recovery of costs, including attorney fees, incurred through

the date the offer of judgment is made, if the offer of judgment is accepted”. *Appellants’ Brief* at 27. CR 68, however, does not say that and no case has held that. Appellants may be arguing that because the Appellants’ CR 68 Offer of Judgment included “taxable costs incurred *to the date of this offer*”, Respondent should not be awarded attorney fees incurred after the date of the offer, including attorney fees on appeal. Appellants, however, cite nothing to support that argument. In fact, the recent case of *O’Neil v. City of Shoreline*, 183 Wash.App. 15, 332 P.3d 1099 (2014) is contrary to Appellants’ argument and supports the award of attorney fees on appeal following an Offer of Judgment.

The relevant facts in *O’Neil* are substantially the same as the facts presented here. In *O’Neil*, the defendant City made the plaintiff O’Neil a CR 68 offer of judgment that stated as follows:

The Defendants, pursuant to CR 68, offer to allow judgment to be entered against them in this matter for \$100,000.00 (One Hundred Thousand Dollar and Zero Cents) for daily penalties. This amount does not include costs, including attorneys’ fees, *incurred to date*, which shall be awarded in an amount to be determined by the Superior Court after subsequent briefing and argument.
[*Emphasis supplied*]

Id., 183 Wash.App. at 18. O’Neil accepted the offer of judgment. After a hearing the trial court entered a Judgment based on the Offer of Judgment

awarding the O'Neils \$428,966.18 for attorney fees and \$9,588.79 for costs. *Id.*, 183 Wash.App. at 20. The City appealed the award of attorney fees. O'Neil prevailed on the appeal and Division 1 awarded O'Neil costs and attorney fees on appeal. *Id.*, 183 Wash.App. at 26. The fact that the City's pre-trial CR 68 offer of judgment included costs and attorney fees "incurred to date" did not prevent the award of additional attorney fees on the subsequent appeal. *Id.*, 183 Wash.App. at 26.

Here, 1921 Mildred, LLC was entitled to attorney fees in the trial court pursuant to RCW 4.24.630(1), and is entitled to attorney fees on appeal under the same statute. RAP 18.1; *Bloor*, 143 Wash.App. at 753; *Standing Rock*, 106 Wash.App. at 247; *O'Neil*, 183 Wash.App. at 26. The fact that Appellants' offer of judgment included costs and attorney fees "incurred to the date of this offer" does not prevent this court from awarding additional attorney fees on appeal. *O'Neil*, 183 Wash.App. at 26. 1921 Mildred, LLC should be awarded reasonable attorney fees on appeal as set forth in RAP 18.1.

IV. CONCLUSION

Under RCW 4.24.630(1) a party "wrongfully causes waste or injury" to the land of another if that party (1) intentionally commits the acts of waste or injury; (2) the acts of waste or injury are unreasonable;

and (3) the offending party knows or has reason to know he or she lacks authority to commit the acts. RCW 4.24.630(1); *Cclipse v. Michels Pipeline Construction, Inc.*, 154 Wash.App. 573, 580, 225 P.3d 492 (2010).

Substantial evidence in the record supports the trial court's findings and conclusions that the 2101 Mildred, LLC (1) entered onto the land of 1921 Mildred, LLC; (2) intentionally built a concrete retaining wall on the 1921 Mildred property; (3) the wall has caused unreasonable waste or injury to the 1921 Mildred property, even though a specific dollar value of the injury was not shown; and (4) 2101 Mildred, LLC knew that it lacked authority to commit the acts of waste or injury to the 1921 Mildred property.

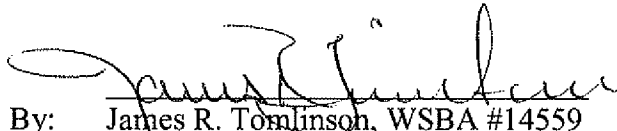
The trial court properly entered judgment against both 2101 Mildred, LLC and Contac 38, LLC because the Appellants' Offer of Judgment so provided. Respondent was entitled to an award of attorney fees in the trial court pursuant to RCW 4.24.630, and the Respondent is entitled to an award of reasonable attorney fees on appeal pursuant to the

same statute. The judgment of the trial court should be affirmed and

Respondent should be awarded its attorney fees on appeal.

RESPECTFULLY SUBMITTED this 18 day of March, 2015.

DAVIES PEARSON, P.C.


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CERTIFICATE OF SERVICE

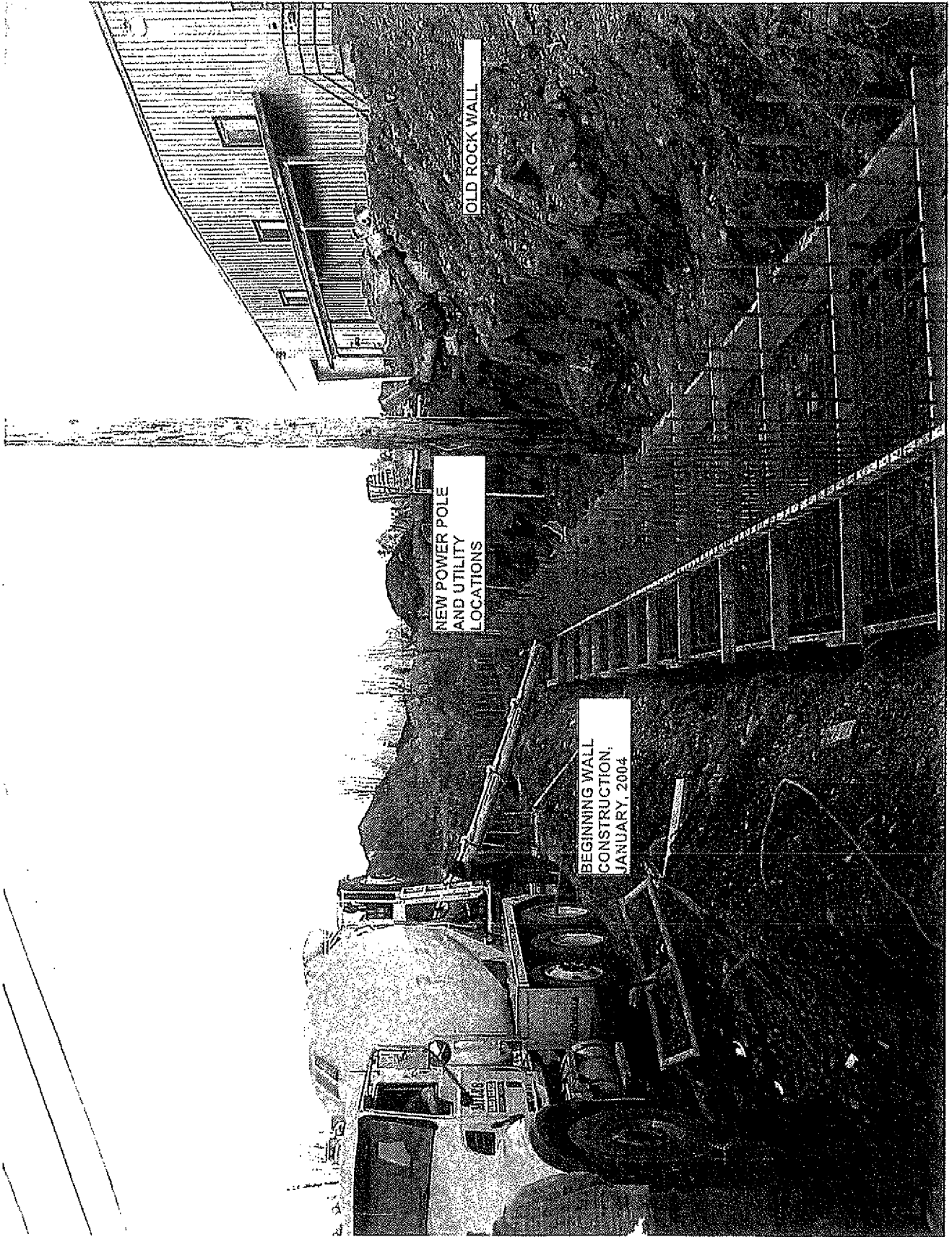
I certify that on the 19 day of March, 2015, I caused a true and correct copy of the Brief of Respondent to be served on the following by email and hand delivery.

Jeffery Paul Helsdon
Oldfield & Helsdon, PLLC
WSBA # 17479
1401 Regents Blvd., Suite 102
PO Box 64189
University Place, WA 98464

Dated this 19 day of March, 2015


Marie Lucente

Appendix A



OLD ROCK WALL

NEW POWER POLE
AND UTILITY
LOCATIONS

BEGINNING WALL
CONSTRUCTION,
JANUARY, 2004

Appendix B



RETAINING WALL
DURING
CONSTRUCTION

EASEMENT ALLEY

1921 MILDRED WEST
BUILDING

LEICARDSON

Appendix C

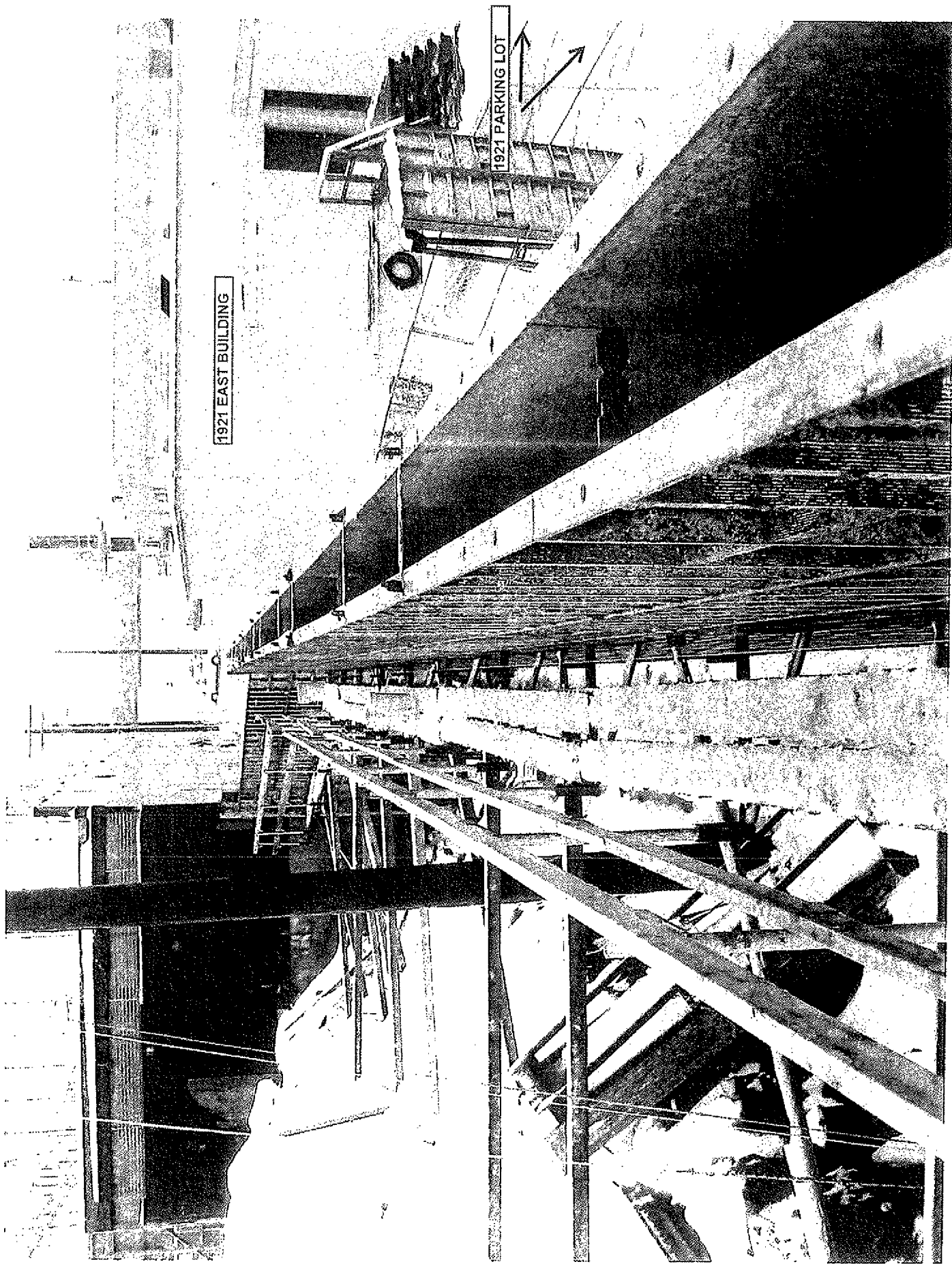


1921 MILDRED EAST
BUILDING

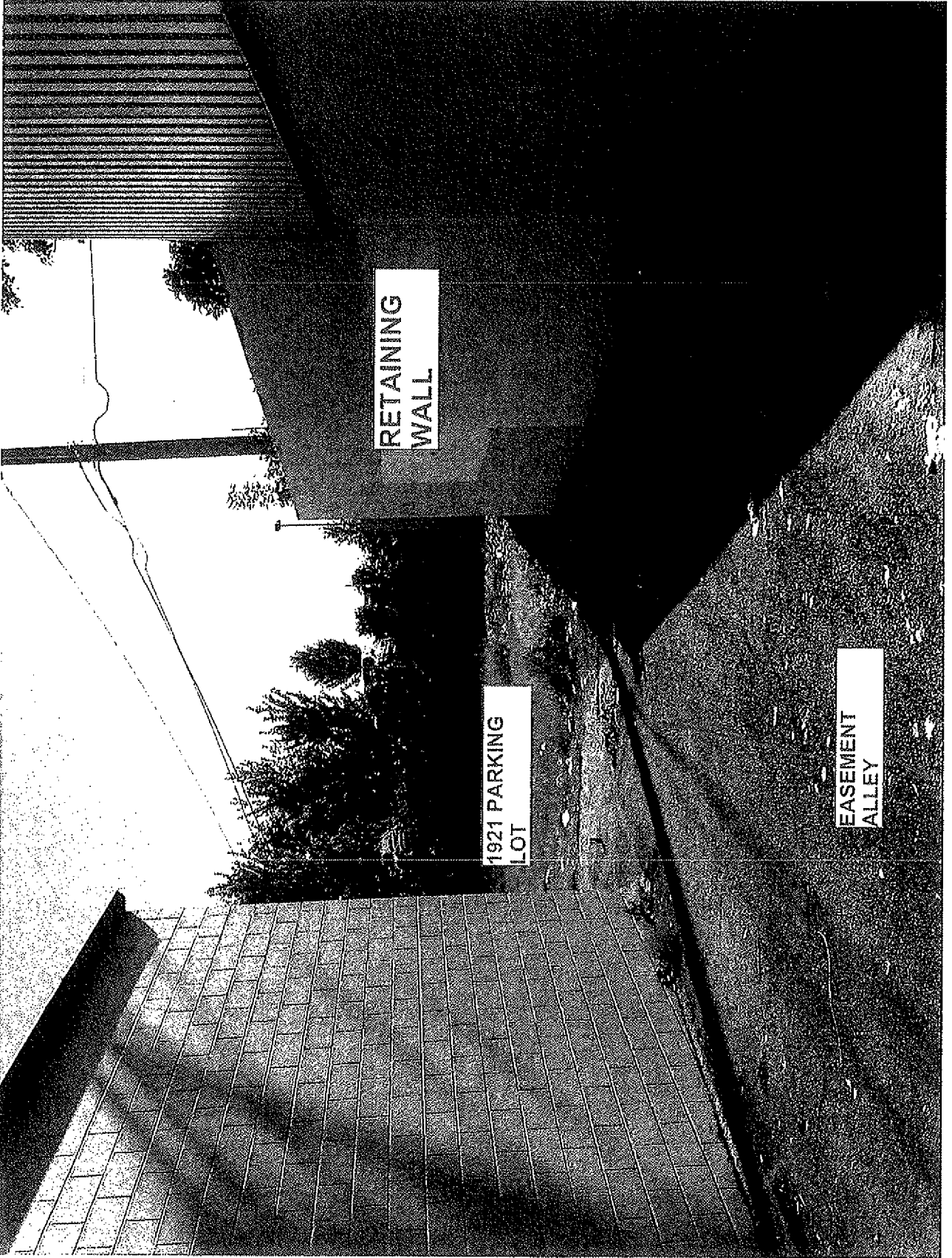
RETAINING WALL
DURING
CONSTRUCTION

EASEMENT ALLEY

Appendix D



Appendix E



RETAINING
WALL

1921 PARKING
LOT

EASEMENT
ALLEY

DAVIES PEARSON PC

March 19, 2015 - 11:37 AM

Transmittal Letter

Document Uploaded: 4-469669-Respondent's Brief.pdf

Case Name: 2101 Mildred, LLC and Contac 38, LLC APP v. 1921 Mildred, LLC RESP

Court of Appeals Case Number: 46966-9

Is this a Personal Restraint Petition? Yes ☐ No

The document being Filed is:

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Statement of Arrangements

Motion: _____

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Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

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Petition for Review (PRV)

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Comments:

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